

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 75685-s76H BY EARL E. GRAY)	
AND THERESA M. RHEA-GRAY)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the July 22, 1991, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 75685-s76H is hereby granted to Earl E. Gray and Theresa M. Rhea-Gray to appropriate 15 gallons per minute up to 10.11 acre-feet per year of the waters of North Channel Bear Creek by means of a headgate located at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 7 North, Range 21 West, in Ravalli County. 8.6 gallons per minute up to 9.12 acre-feet of water shall be appropriated during the period of January 1 to July 15 and October 1 to December 31, inclusive of each year for fish and wildlife; 15 gallons per minute up to .85 acre-feet of water

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5. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of waters.

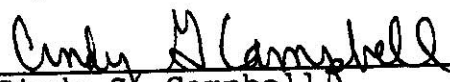
6. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Ernest E. Buchholz
Myrna J. Buchholz
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Vivian A. Lighthizer
Hearing Examiner
Department of Natural
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1520 East Sixth Avenue
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Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 75685-s76H BY EARL E. GRAY)
AND THERESA M. RHEA-GRAY)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 19, 1991, in Missoula, Montana.

Applicants Earl E. Gray and Theresa M. Rhea-Gray appeared at the hearing by and through Earl Gray.

Objectors James M. and Dianne R. Hill appeared at the hearing pro se.

Objector Robert F. Cox appeared at the hearing pro se.

Objectors Dorothy M. and James L. Rivera appeared at the hearing by and through Dorothy M. Rivera.

Objectors Donald J. and Helen I. Golder appeared at the hearing by and through Helen I. Golder.

Michael P. McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Objectors Leo C. Riffel, Ernest E. and Myrna J. Buchholz, Mabel Monson, and Marvin Simonsen, did not appear at the hearing. Therefore, in accordance with ARM 36.12.208 their objections are hereby dismissed.

Objectors Ralph Simonsen, Erma J. Jaques, and Gerald A. and

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Dorothea Martin did not appear at the hearing. These Objectors had signed a Stipulation to Resolve Objections to the issuance of a permit; however, each of them had altered the date in item 2 to July 1 as the date to cease diverting each year. Since the Applicant did not agree to that change, the stipulation is not binding and the Objectors should have appeared at the hearing to present their case. Since they did not, their objections are also dismissed.

Objector Dorothy S. Grauman also signed a Stipulation to Resolve Objections and altered the dates. Ms. Grauman filed an untimely objection to this Application; therefore, pursuant to ARM 36.12.219, Ms. Grauman does not have standing as a party.

EXHIBITS

Applicants' Exhibit 1 a through o consists of 15 photographs of Applicants' property showing the ponds, places of use, pipes, and other incidentals to the project. These photographs were used by Mr. Gray to illustrate his statement of case.

Department's Exhibit 1 consists of two pages. The first page is a copy of a map showing the location of gauging stations monitored by the United States Geological Service (USGS). The station of interest is identified by the number 434. The second page is a copy of page 346 of a USGS publication which contains information obtained at gauging station 434.

Department's Exhibit 2 consists of 13 pages and is a copy of a Reconnaissance Conservation Report on Water Control, Use and Disposal, Bitterroot River Drainage Basin, Ravalli County,

Montana.

All exhibits were accepted into the record without objection.

The Department file was made available for review by all parties who had no objection to any part of it; therefore, the Department file is entered into the record in its entirety.

PRELIMINARY MATTERS

The Objectors who attended the hearing in this matter did not provide sufficient information concerning their water rights for the Hearing Examiner to fully understand their water rights and evaluate any possible adverse effect that may be caused by the Applicants' project. Therefore, the Hearing Examiner took administrative notice of the water rights of record filed by those Objectors.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) or 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Earl E. Gray and Theresa M. Rhea-Gray duly filed the above-entitled Application with the Department on August 24, 1990.

3. Pertinent portions of the Application were published in the Ravalli Republic on February 27, 1991.

4. Applicants purchased their property of 10.10 acres in June of 1989. They thought they had water rights to go with the land, but learned in July of 1990, that they had no water rights. At that time, they began the process to obtain a Beneficial Water Use Permit. The diversion works and the two ponds were in place as well as two household wells when Applicants purchased the property. Both ponds were constructed prior to 1973, one was built in 1971 and the other 1972. Both ponds have been stocked with fish and have been used by ducks, geese, herons, and deer. (Testimony of Applicant.)

5. North Channel Bear Creek flows through the northwest corner of Applicants' property. Applicants do not divert directly from the channel of North Channel Bear Creek. Water is diverted from an oxbow¹ which extends into Applicants' property another 40 feet. (Testimony of Applicants and Department file.) The present means of diversion consists of two four-inch buried pipes connecting the oxbow with the main pond. Rocks have been placed in the oxbow to help route the water into the pipes. Water can be diverted by this system only when the creek is high enough for water to flow through the oxbow. (Applicants' Exhibit 1 b and testimony of Applicants.) There is no control structure

¹Applicant Earl Gray described the oxbow as a natural diversion and referred to the oxbow as the diversion throughout the hearing and on the measurement report in Department file.

on Applicants' means of diversion, when the water is high enough in the oxbow, water flows through the pipes. The diversion does not divert all of the water that flows in the oxbow. (Applicants' Exhibit 1 a and b.) The overflow from the main pond flows back into the oxbow through an open overflow channel approximately 88 feet long, then into North Channel Bear Creek. (Applicants' Exhibit 1 d and e.)

The second pond is fed from the main pond by a buried pipe which begins as a six-inch pipe but is reduced to four inches before it reaches the second pond. (Applicants' Exhibit 1 i.) The overflow of this pond has been used to water Applicants' livestock. The overflow then flows back toward Middle Bear Creek, but because there are several beaver dams on the neighboring property, it most likely never reaches North Channel Bear Creek. (Testimony of Applicant.)

6. Two irrigation systems were in place at the time of Applicants' purchase. The first system diverts water from the main pond and is used for lawn and garden at the trailer house shown in Applicants' Exhibit 1 a. This system is equipped with a three-quarter horsepower pump mounted on a dock. Only half of this system is underground thus requires hoses and sprinklers. The second system provides water for the large lawn at the Applicants' home shown in Applicants' Exhibit 1 k and j. This system is fully installed underground and operates on a timer system. This system diverts water from the second pond by means of a two horsepower pump. (Testimony of Applicant.)

7. Applicants propose to install a headgate on the diversion in the oxbow at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 7 North, Range 21 West, in Ravalli County,² to control the amount of water diverted into the main pond which is located at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2. The main pond would be operated as a flow-through system, i.e., after the initial filling which would occur during the high runoff period in the spring, the same amount of water entering the pond, 15 gallons per minute (gpm), would exit the pond except a minute amount lost to evaporation. Applicants further propose to change the overflow channel from the main pond to a pipe 31 feet long which would eliminate water loss by evaporation and percolation while being returned to the creek. Applicants propose to eliminate the overflow from the second pond which is also located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, by installing a valve on the supply line between the ponds to control the amount of water entering the second pond. This proposal would reduce the amount of water appropriated from the North Channel Bear Creek because water would no longer flow through the second pond to be lost by evaporation or in the beaver ponds. Instead water would be appropriated for that pond only to make up water lost by evaporation.

The two four-inch diversion pipes without controls have been

²All land descriptions in this proposal are located in Township 7 North, Range 21 West, in Ravalli County, unless otherwise stated.

diverting considerably more than 15 gpm when the water was high. By installing a control on these pipes, more water will be left in the creek to be appropriated by other appropriators.

(Testimony of Michael McLane and Applicant.)

8. Applicants have pumps that can be used as circulation pumps to supply the oxygen necessary to keep the ponds viable for trout in the absence of the flow through water from the creek.

(Testimony of Applicants.)

9. During the hearing, Applicants made reference to their intent to irrigate two acres which had not been irrigated previously. However, the Application does not reflect a request for any water for irrigation except that needed for the lawns and garden which have been irrigated. The total amount of water requested for lawn and garden, .85 acre-feet per year, is not sufficient to irrigate two acres.

10. Applicants measured the flow of North Channel Bear Creek, the flow of the oxbow, the inflow to the ponds, and the outflow of the ponds on August 23, 1990. The flow of North Channel Bear Creek was 23.14 cfs. The flow of the oxbow was 9.34 cfs. The inflow and outflow of the ponds were 8.6 gpm.

(Department file.)

11. Applicants signed a Stipulation to Resolve Objections wherein the period of diversion for lawn and garden was modified to be from April 15 to July 15. Diversion for stock water and fish and wildlife uses was modified to be from January 1 to July 15 and October 1 to December 31. All diversions during the

period of July 15 to September 30 were omitted from the Application. This document supersedes the "work copy" of the Application. (Department file.)

12. Bear Creek has a drainage area of 26.8 square miles down to gauging station 434, most of which is basically a wilderness area. Bear Creek was monitored from 1938 to 1950 by the USGS. Maximum discharge during that period was 1,340 cubic feet per second (cfs) on June 16, 1950. Minimum discharge recorded was one cfs on September 13, and November 15, 1944. The data collected at that time is still valid since the drainage area has not been highly manipulated. Bear Creek is a decreed stream which flows in response to snowmelt and precipitation. A Water Commissioner is frequently appointed to regulate the water uses of Bear Creek. (Department's Exhibit 1 and testimony of Applicants, Objectors and Michael McLane.)

13. There are other water users on Bear Creek and ditches from Bear Creek that have built ponds and/or pump water at night without a water right. The Water Commissioner is unable to control these users. (Testimonies of Objectors Rivera and Golder.)

14. Objectors Hill filed late Statements of Claim No. W210800-76H, W210801-76H, and W210802-76H on May 9, 1984, for decreed water rights from North Channel Bear Creek for irrigation. Objectors Hill bought their property because it has 1550 feet of North Channel Bear Creek on it and they want to have water flowing in the creek. Mr. Hill believes he has water

rights for stock and domestic, however, there is no record to substantiate this. (Department records and testimonies of Objectors Hill.)

15. Objectors Golder filed Statements of Claim No. W33671-76H, W33672-76H, W33673-76H, W33674-76H, W33675-76H, and W33676-76H for decreed water rights from Bear Creek. The point of diversion claimed on all these Claims is the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, Township 7 North, Range 21 West, Ravalli County, which is upstream from the Applicants' point of diversion and cannot be adversely affected by the Applicants' diversion. (Department records.)

16. Objector Cox filed Statements of Claim No. W103852-76H, W103853-76H, W103854-76H, W103855-76H, W103856-76H, and W103857 for decreed irrigation rights from North Channel Bear Creek. Mr. Cox's claimed point of diversion for all these Claims is the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, which is the Allison-Reinkel Ditch diversion. The priority dates claimed by Mr. Cox are 1883, 1884, and 1887. (Department files.)

Mr. Cox sometimes has no ditch water available on June 1. He uses his ditch water exclusively for irrigation even though he does have a right to water his stock from the ditch. Mr. Cox waters his stock from his well. Mr. Cox believes if the instant Application is granted, there will be an additional use from the stream, therefore less water. Objector Cox believes Applicant should use his wells for the ponds. (Testimony of Mr. Cox.)

17. Objectors Rivera filed Statements of Claim No. W29143-

76H, W29144-76H, W 29145-76H W29146-76H, W29147-76H, W29148-76H, W29189-76H, W29190-76H, W29191-76H, W29192-76H, W29193-76H, and W29194-76H for decreed water rights on North Channel Bear Creek. The claimed priority dates are 1883, 1884 and 1887. The point of diversion claimed on all these Claims is the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, the Allison-Reinkel Ditch diversion. (Department files.)

The Riveras have lived in the area for 15 years and during that time they have seen their supply of water decrease. Objectors Rivera nearly always run out of water by June 15. The Riveras use their house well and catch water which runs off the roof of their house for stock. They have used the house well to irrigate by sprinkler after water from North Channel Bear Creek is no longer available. They have also developed a spring to furnish water for irrigation and stock and have received Certificate of Water Right No. 37009-g76H for this spring. Although these alternate sources help, Riveras would rather use water from Bear Creek because it is less expensive. (Testimony of Dorothy Rivera.)

18. All parties at the hearing agreed that this year, 1991, was a good year and water would be available into July although the creek had begun to decrease in flow at the time of the hearing.

19. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved. (Department records.)

Based upon the foregoing Findings of Fact and upon the

record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence

standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed uses of water, lawn and garden, fish and wildlife, and stock, are beneficial uses. See § 85-2-102(a).

5. Applicants have possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 4.

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4, 5, 6, 7, and 8.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 19.

8. Applicant has proved by substantial credible evidence the availability of unappropriated water in the source of supply at the proposed point of diversion in the amount requested and that during the proposed period of diversion the amount requested is reasonably available. See Findings of Fact 5 and 10. The test for availability of unappropriated water consists of proving the physical presence of water at the intended points of diversion. See § 85-2-311(1)(a); In re Application No. 72399-s41D by United States; In re Application No. 70511-s76LJ by Winter Sports, Inc.; In re Application No. 63997-s42M by

Crisafulli; Department of Natural Resources and Conservation,
Summary Report: Clark Fork Basin Water Use (1990).

9. The Applicant has provided substantial credible evidence that the water rights of a prior appropriator will not be adversely affected. See Finding of Fact 4, 5, 6, 7, 11, 14, and 15.

The ponds have been in place for a minimum of 19 years without complaint from other users. When the ponds were constructed prior to July 1, 1973, one could establish a water right simply by putting the water to beneficial use. After the enactment of the Water Use Act, the ponds were still legal because the pre-1973 use rights were recognized in the Water Use Act. The water rights for the ponds were abandoned when the owner failed to file Statements of Claim of Existing Water Rights before the deadline of April 30, 1982. Because the water supply in Bear Creek has been gradually decreasing over the last 15 years, one must conclude that the water shortages are caused by the unauthorized ponds and other unauthorized uses. See Finding of Fact 13 and 17.

Objectors Hill do not have valid irrigation rights from North Channel Bear Creek. Section 85-2-226, MCA, states, "[t]he failure to file a claim of an existing right as required by 85-2-221 establishes a conclusive presumption of abandonment of that right." Section 85-2-221(1), MCA, requires that, "[a] person claiming an existing right, unless exempted under 85-2-222 or unless an earlier filing date is ordered as provided in 85-2-

212, shall file with the department no later than June 30, 1983, a statement of claim for each water right asserted on a form provided by the department." By order dated December 7, 1981, the Montana Supreme Court changed its earlier January 1, 1982, deadline for filing claims by extending "[t]he final date for filing statements of claims to existing rights to the use of water in this state arising prior to July 1, 1973, . . . to Friday, April 30, 1982, at 5:00 o'clock p.m."

James and Dianne Hill's Statements of Claim of No. W210800-76H, W210801-76H, and W210802-76H were filed beyond the April 30, 1982, deadline, and are therefore conclusively presumed to be abandoned. See In re Application No. G211081-76LJ by Rasmussen. Objectors Hill may have exempt rights for stock and domestic use; however, there is no evidence in the record as to the amount of any such exempt rights. Nor do Objectors Hill have a right to enjoy a continuous flow in the creek. Although aesthetics may be a beneficial use, Objectors Hill do not hold such a right.

This development cannot adversely affect Objectors Golder because the Golders' point of diversion is upstream from Applicants' point of diversion and the Golders have the opportunity to divert water before the Applicant. See Finding of Fact 15.

The prior rights of Robert Cox and Objectors Rivera will not be adversely affected because the Applicants are going to install a gate on the means of diversion so that if Mr. Cox or the Riveras make a legitimate call for water, the gate can be closed

to stop diverting the water. This and the other proposed improvements to the system will assure no adverse effect. See Finding of Fact 7. There will be years when Applicant may be able to appropriate the full amount of water requested and there will be years when Applicants may not be able to appropriate the full amount of water requested. See Finding of Fact 12 and 18. However, to comply with § 85-2-311, MCA, all that is needed is the Applicants must prove that at least in some years, sufficient water will be available at the point of diversion to supply the amount requested throughout the period of appropriation and that at least in some years no legitimate calls for water will be made. See In re Application No. 60662-s76G by Hadley.

10. Objector Cox indicated that Applicant should use the water from his two wells instead of the water from North Channel Bear Creek for the ponds. See Finding of Fact 16. A review of the statutes and of case law provides no foundation for the argument that an applicant should not be allowed to appropriate from one source because he has an alternate source. If an appropriator can make beneficial use of his intended source without adversely affecting senior appropriators, and can meet the relevant statutory criteria, he is not bound to use water from an alternate source. The Department is authorized to consider the amount of water available to the Applicants as a factor in a determination on the beneficial use criteria; however, the existence of other water rights does not mean the Applicant in the present matter cannot beneficially use both the

wells and the water sought in the instant Application. In fact Applicants' testimony indicated the groundwater wells contain large amounts of iron which make the water orange and would not be good for the trout in the ponds. Moreover, the Applicant cannot be required to use his wells instead of water sought in the instant Application, even if he could use it in the trout ponds, as Mr. Cox suggested. An appropriator cannot be compelled to forego his use of water for the benefit of other appropriators on the source simply because he has another source available to him. See generally Boyd v. Huffine 144 Mont. 306, 120 P. 228 (1911); In re Application No. 43117-s41P by Mancoronal; In re Application No. 54911-g42M by Sackman; In re Application No. G65713-76N by Fagan; In re Application No. 67795-s76D by Zarnowski.

11. Since Applicants failed to request an amount of water to be used for new irrigation on the Application, the Department cannot grant an amount of water for a use that was never requested either on the Application form or any subsequent stipulations. See Finding of Fact 9.

Wherefore, based upon the foregoing Findings of fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 75685-s76H is hereby granted to Earl E. Gray and Theresa M. Rhea-Gray to appropriate 15 gallons per minute up to

10.11 acre-feet per year of the waters of North Channel Bear Creek by means of a headgate located at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 7 North, Range 21 West, in Ravalli County. 8.6 gallons per minute up to 9.12 acre-feet of water shall be appropriated during the period of January 1 to July 15 and October 1 to December 31, inclusive of each year for fish and wildlife; 15 gallons per minute up to .85 acre-feet of water shall be appropriated during the period of April 15 to July 15 inclusive of each year for .43 acres of lawn and garden; and .14 acre-feet of water shall be appropriated during the period of January 1 to July 15 and October 1 to December 31 inclusive of each year for stock. The place of use shall be two off-stream ponds and lawns and garden located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 2. The capacity of the ponds shall be 1.38 acre-feet and 1.15 acre-feet.

1. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

2. The Permittee shall install a permanent control device which allows for the regulation of water diverted into the pond. Further, the permittee shall install an adequate measuring device in order to allow the measurement of diverted waters.

3. The Permittee agrees to either eliminate discharge from both ponds and/or develop a return flow conveyance system which will return discharge waters to the original source of supply

substantially undiminished in quantity, quality, and timing.

4. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request. This condition is being applied to this permit until quantification through permit verification occurs.

5. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of waters.

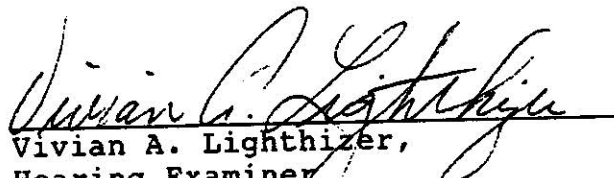
6. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the hearing officer determines that no existing water rights are being adversely affected.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 22nd day of July, 1991.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 22nd day of July, 1991 as follows:

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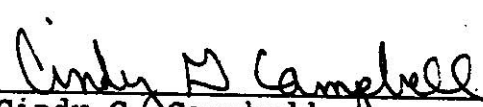
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